2-19-1976

Elisabeth Kirtley Jacobs v. Jack Hughes Jacobs

Appellant's Brief 1975-SC-0975

APPELLANT'S BRIEF

3788

SUPREME COURT OF KENTUCKY

75-975

ELISABETH KIRTLEY JACOBS - - Appellant

versus

JACK HUGHES JACOBS - - - - Appellee

APPEAL FROM JEFFERSON CIRCUIT COURT
CHANCERY BRANCH, FIFTH DIVISION
HONORABLE ALEXANDER G. BOOTH, JUDGE

ADDITIONAL BRIEF FOR APPELLANT, ELISABETH KIRTLEY JACOBS

WALTER L. CATO, JR.
3144 First National Tower
101 South 5th Street
Louisville, Kentucky 40202

Attorney for Appellant, Elisabeth Kirtley Jacobs

This is to certify that copies of the within brief have been served on William Cobb, 1200 Security Trust Building, Lexington, Kentucky 40507; Robert Kirtley, Kirtley & Kirtley, 205 W. 2nd St., Owensboro, Kentucky 42301; and the Honorable Alexander G. Booth, Judge, Chancery Branch, Fifth Division, Jefferson Circuit Court, Jefferson County Fiscal Court Bldg., Louisville, Kentucky 40202, the trial judge, pursuant to RCA 1.250.

Walter L. Cato, Jr.

Attorney for Appellant, Elisabeth Kirtley Jacobs

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF CONTENTS AND AUTHORITIES

PAGE

Purpose of the Brief 1

Questions To Which Brief Addressed 2

1. Did the Appellee misstate certain facts in his "statement of the case" and in his argument regarding testimony about factors to be considered in awarding custody of the children?

2. Did the Trial Court err in admitting a psychiatrist's opinion which was based on tests performed by a third person whose testimony was not taken or admitted into evidence.

Argument 2–6

1. The Appellee misstated certain facts regarding testimony about the fitness of the parties for child custody 2–3

   Parker v. Parker, Ky., 467 S. W. 2d 595 (1971). 3

2. The erroneous admission into evidence of the testimony of Dr. A. T. Daus in this case is distinguishable from the case cited by Appellee in support of the admission of such testimony.... 4–6

   Young v. New England Transport Co., 199 A. 2d 300 (1964) 5

   Buffalo Cab Co., Inc. v. Gurley, Ga., 213 S. E. 2d 545 (1975) 5

   Zurich Ins. Co. v. Zerfass, 106 Ga. App. 714, 128 S. E. 2d 75 5

   Caudill v. Honeycutt, Ky., 437 S. W. 2d 171 (1969) 5

SUPREME COURT OF KENTUCKY

75-975

ELISABETH KIRTLEY JACOBS - - - *Appellant*

v.

JACK HUGHES JACOBS - - - - - *Appellee*

APPEAL FROM JEFFERSON CIRCUIT COURT
CHANCERY BRANCH, FIFTH DIVISION
HONORABLE ALEXANDER G. BOOTH, JUDGE

ADDITIONAL BRIEF FOR APPELLANT, ELISABETH KIRTLEY JACOBS

PURPOSE OF THE BRIEF

The Appellant's purpose in preparing this brief is to point out certain discrepancies and omissions in Appellee's brief in that portion of his brief styled "Statement of the Case." It is further Appellant's purpose to distinguish between the case cited by Appellant regarding the admissibility of medical evidence and the circumstances in this case involving the admission into evidence of the testimony of a psychiatrist who patently based his opinion on the question of custody placement on tests conducted by a psychologist whose testimony was not elicited and whose tests weren't admitted into evidence.

QUESTIONS TO WHICH THE BRIEF IS ADDRESSED

1. Did the Appellee misstate certain facts in his "Statement of the Case" and in his Argument regarding testimony about factors to be considered in awarding custody of the children?

2. Did the Trial Court err in admitting a psychiatrist's opinion which was based on tests performed by a third person whose testimony was not taken or admitted into evidence?

ARGUMENT

1. The Appellee Misstated Certain Facts Regarding Testimony About the Fitness of the Parties for Child Custody.

Appellee's brief contains a section entitled "Statement of the Case." Appellant assumes that this section was meant to be styled "Counterstatement of the Case" as the Rules of the Court of Appeals provide.[1] Appellant is of the belief that the Counterstatement of the Case should be restricted to the counterstatement of facts rather than an amalgam of facts, allegations and argument. Appellant believes that the "Statement of the Case" by Appellee was shot through with discrepancies, omissions and misstatement and that these should be pointed out to the Court.

Appellee erroneously suggested in his brief on page 2 that the Trial Court found as a fact that Appellee's mother had "virtually raised" the child, Kirt.

[1]RCA 1.210.

Although footnote 1 on that page refers to "Trial Court's Findings, Record on Appeal, Page 140," in point of fact, the Judge found that Kirt "had spent much of his life" in the home of his grandmother.

The Trial Court did not rule that Appellee's work record was irrelevant to the question of custody as was stated by Appellee on page 2 of his brief. It should be pointed out that the Trial Court stated that the "relevance is very, very small, if any . . ."[2] and in this vein, may have been erroneous in light of the case of *Parker* v. *Parker,* Ky., 467 S. W. 2d 595 (1971). One of the criteria set out in this case to be used in determining custody is: "7. The possible financial arrangements. Whether the mother and father both must work or their ability to work and produce an income to support the family." This factor would appear to make the appellee's work and employment record relevant to the issue of a custody determination.

In his argument, appellee's counsel permits himself even greater license with the facts. Perhaps the lack of objectivity in the facts cited in the argument can be explained by the fact that appellee is represented by his brother. On page 5 of his brief, appellee makes the erroneous statement that "Not one scrap of testimony" was elicited on trial to support the award of custody of the younger child to her. A casual reading of the testimony of appellant's witnesses will reveal the error of appellee's assertion.

---

[2]Vol. II, Transcript of Evidence, Ques. 440, p. 96.

2. The Erroneous Admission Into Evidence of the Testimony of Dr. A. T. Daus in This Case Is Distinguishable From the Cases Cited by Appellee in Support of the Admission of Such Testimony.

Appellant submits that if the testimony of a psychiatrist, called for the purpose of testifying about the weighty issue of child custody, is to be given weight by the Chancellor, then it should be testimony based at least on an examination of the subject person. Otherwise, it shouldn't be admitted. The testimony of a psychiatrist who deigns to offer his opinion about taking a child from its mother without having interviewed the father[1] or the mother[2] or the elderly grandmother with whom the child now lives (along with his father),[3] causes appellant to wonder about the credibility to be given the practice of psychiatry.

Dr. Daus' credibility is further shaken by his opinion that appellee did not have a drinking problem. The opinion, elicited by appellee's counsel on direct examination,[4] was based upon a brief sighting of appellee by Dr. Daus on one occasion, and by Dr. Epstein's hearsay opinion.[5] On page 10 of his brief, appellee stated that "Dr. Daus' opinion was his own, based upon his own scoring of the five standardized tests." Nowhere in Dr. Daus' deposition could appellant find testimony that anyone other than Dr. Epstein scored the tests.

---

[1]Deposition of Dr. A. T. Daus, p. 19, Line 1.
[2]Deposition of Dr. A. T. Daus, p. 21, Line 17.
[3]Deposition of Dr. A. T. Daus, p. 28, Line 9.
[4]Deposition of Dr. A. T. Daus, p. 11, Line 24.
[5]Deposition of Dr. A. T. Daus, pp. 21 and 22, Line 18, et seq.

The problem of admitting into evidence the testimony of a medical expert which is based wholly or partially on records, reports or tests not in evidence has been treated in a number of cases from other jurisdictions.

In *Young* v. *New England Transport Co.,* 199 A. 2d 300 (1964), the opinion testimony of a physician was held to be inadmissible where the circumstances upon which it rested had not been supplied as facts in the case by competent testimony, but embraced reports and records which were not in evidence.

The case of *Buffalo Cab Co., Inc.* v. *Gurley,* Ga., 213 S. E. 2d 545 (1975), comes closest to the particular issue in the case at bar. In the *Buffalo Cab* case, the Georgia Court held that testimony which depends on a laboratory report is inadmissible unless the report is admissible as a business record or the facts relied on therein are otherwise proved. Citing *Zurich Ins. Co.* v. *Zerfass,* 106 Ga. App. 714, 128 S. E. 2d 75, the Court quoted "opinion testimony based merely upon records and case history furnished the witness by other doctors and not a part of the evidence in the case is objectionable."

In contrast to the above cases, the *Caudill* case[6] cited by appellee is distinguishable by the fact that the examining doctor in the *Caudill* case had, in fact, examined the patient on two occasions. Dr. Daus, conversely, talked five to eight minutes with the child and thereafter presumed to testify about the advisability of placing the custody of the child with a man whom

[6]*Caudill* v. *Honeycutt,* Ky., 437 S. W. 2d 171 (1969).

he had never interviewed, patently basing his opinion on tests conducted by a psychologist who did not testify, whose tests were not introduced in evidence, and whose employment by the testifying doctor was not established. The testimony of Dr. Daus should have been rejected by the Trial Court.

Respectfully submitted,

WALTER L. CATO, JR.
3144 First National Tower
101 South 5th Street
Louisville, Kentucky 40202

Attorney for Appellant, Elisabeth Kirtley Jacobs